Review Essay

The Burden of Assessing *Brown*

THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION. *By* Raymond Wolters. *Knoxville: University of Tennessee Press*, 1984. Pp. 346. $24.95.

THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION. *By* Jennifer L. Hochschild. *New Haven: Yale University Press*, 1984. Pp. xvi, 263. $27.00 (cloth); $8.95 (paper).

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Thirty years ago, the Supreme Court's decisions in the *Brown* litigation[1] started the school systems of the United States on an "experiment" in race relations management, in the sense that Justice Holmes once called the First Amendment "an experiment, as all life is an experiment."[2] The constitutional result of *Brown*[3] is no longer seriously questioned; it seems clear now at least, as it seemed to most constitutional lawyers in 1954 and 1955, that separate school systems based on race, especially in the context of the open racial oppression by law in the states where dual systems existed, are not constitutionally tolerable under the equal protection clause of the Fourteenth Amendment.[4] What is increasingly at risk is the Court's rationale for its decisions, as well as its theory (if any) of remedy. The rationale for *Brown* is murky, perhaps intentionally so, perhaps a consequence of the well-publicized desire for unanimity.[5] It has never been altogether clear, for example, whether the Court

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1. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (*Brown I*); Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) (*Brown II*).

2. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." 347 U.S. at 495.

4. "No state shall. . .deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

5. *See* R. KLUGER, SIMPLE JUSTICE 582-616, 678-99 (1976).

thought actual educational disadvantage to black students, as opposed to intentional racial separation devoid of any provable adverse effects, was at the heart of the holding in *Brown*. The Court's treatment of other forms of state-sanctioned segregation strongly suggests that *Brown* did not turn on, or at least did not require proof of, educational harm.[6]

The question of remedy was deliberately left unanswered in *Brown II*,[7] and it remains necessarily ambiguous because of confusion as to the source and precise identification of the constitutional rights at stake. It is still uncertain whether the core principle involved in that case should be analyzed solely with regard to violations of the rights of *individuals* or whether, as I believe,[8] "discrimination against a people" must be remedied by structural change that includes race-conscious assignments aimed at dismantling dual school systems, as *Green v. County School Board of New Kent County*[9] and *Swann v. Charlotte-Mecklenburg Board of Education*[10] clearly imply. In any case, the conception of remedy has either changed or evolved enormously since the Court's 1955 decision in *Brown II*.[11]

This brief background is explanation enough for welcoming the outpouring of serious studies of the school desegregation experiment. There is sufficient difficulty, controversy, paradox, and social tension to tempt historians like Raymond Wolters and political scientists like Jennifer Hochschild, as well as sociologists, economists, philosophers, and educational theorists, into bringing their special insights to the constitutional traces of the *Brown* decisions. Moreover, it is an area in which lawyers and legal academics probably have little left to contribute.

While Wolters's *The Burden of Brown*[12] and Hochschild's *The New American Dilemma*[13] both use the *Brown* litigation as a starting point,

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6. *See* Marshall, *Southern Judges in the Desegregation Struggle* (Book Review), 95 HARV. L. REV. 1509, 1509 n.6 (1982) and cases cited therein.

7. 349 U.S. at 298-301.

8. Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities"*, 93 YALE L.J. 1006 (1984).

9. 391 U.S. 430 (1968).

10. 402 U.S. 1 (1971).

11. 349 U.S. 294 (1955).

12. R. WOLTERS, THE BURDEN OF BROWN (1984) [hereinafter cited as WOLTERS]. This book was given the Gavel award for 1985 by the American Bar Association. *See* Wash. Post, July 5, 1985, at A10, col. 1. As this review shows, I think the award was a bad mistake. The membership of the awards committee and the procedures it follows convince me, however, that the error was in judgment and care, and that no political statement was intended.

13. J. HOCHSCHILD, THE NEW AMERICAN DILEMMA (1984) [hereinafter cited as HOCHSCHILD].

their books contrast in virtually every other respect. Methodologically, Hochschild depends on empirical work that reflects the school desegregation experience throughout the nation. Wolters uses instead detailed case studies of the lawsuits that culminated in *Brown*, drawing his conclusions from the subsequent histories of those particular school systems, and making no attempt at comparative analysis of other seemingly similar ones. The conclusions of the two authors lie at opposite poles of the critical spectrum. Wolters sees meddling, intrusive courts as having deeply and adversely affected the educational enterprises he examines, while Hochschild argues that, on the contrary, the problem has been timidity on the part of judges and other officials in the face of a pressing need for active and forceful desegregation. These conclusions can be seen as resting on fundamental if unarticulated differences in each author's conception of the scope of rights and remedies in the desegregation context. Wolters focuses on individual choice and a color-blind nondiscrimination principle, while Hochschild is concerned with patterns of equality among racial groups.

The Wolters book is a product of revisionism and despair. Its premise is not that *Brown* was wrongly decided, but that the rights announced in *Brown* should be without any system-wide remedy, because the implementation of a remedy dealing with an entire school system, instead of with just the assignment of individual students, does significant and lasting harm to the educational mission of the schools, at least in most cases. In doctrinal terms, Wolters believes that the Court made a mistake in the *New Kent County* case, where it effectively barred the use of freedom-of-choice plans on which the South (and eventually the North) had come to depend, in reliance on Judge John J. Parker's famous opinion on remand in the Clarendon County case, where he said that the Supreme Court had "not decided that the states must mix persons of different races in the schools. . . . What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains."[14] Wolters's thesis, repeated in bits and pieces throughout the book, is summarized in his introduction:

> In the *Brown* districts, education has suffered grievously from naively liberal court orders, from the influence of progressive education, and from the defiant and irresponsible behavior of some students. The

14. Briggs v. Elliott, 132 F.Supp. 776, 777 (E.D.S.C. 1955). The decision was formally rendered *per curiam*.

> Constitution has also suffered as judges have arrogated the right to make social policy. Segregation was anachronistic in the middle of the twentieth century, but in a democracy social reform should be undertaken by the people's elected representatives, not by unelected judges. I further believe the Supreme Court erred in policy as well as in prerogative when it moved from color blindness to color consciousness and began to impose remedies that require racial balance. My own point of view is so different from the prevailing wisdom that it seems advisable to state it candidly at the outset and then to present the evidence in detail and with a minimum of didactic intrusions.[15]

The last sentence suggests that the "evidence" forced Wolters to his conclusions, but it is hard to avoid the impression that his conclusions came first. There is nothing in the choice or presentation of the factual material in the book that compels or even substantially supports any of his preceding four assertions.

Wolters has chosen for his case studies the school districts involved in the five lawsuits that happened to be ripe for constitutional decision during the 1952-1954 Terms of the Supreme Court.[16] These cases, as is well known, arose in Topeka, Kansas,[17] Prince Edward County, Virginia,[18] Clarendon County, South Carolina,[19] New Castle County, Delaware,[20] and the District of Columbia.[21] The sweeping conclusions I have just quoted rely on historical accounts of the events in these five school systems. That is the significance of Wolters's opening qualifier — "in the *Brown* districts" — although I think it fair to say both that he does not confine his reflections to the experience in those districts and that the reader is not meant so to confine her own impressions about the consequences of *Brown*.

Although there is a surface plausibility to the choice, it seems to me methodologically arbitrary to pick these five districts for study. They have little to do with each other, except for the coincidence of their positions on the dockets of the NAACP and the Legal Defense

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15. WOLTERS at 7-8.

16. The choice of cases in 1954 was, of course, in some sense predetermined by the litigation strategy of the NAACP. *See generally* R. KLUGER, SIMPLE JUSTICE (1976).

17. Brown v. Bd. of Educ. of Topeka, 98 F.Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955).

18. Davis v. County School Bd. of Prince Edward County, 103 F.Supp. 337 (E.D. Va. 1952), *rev'd sub nom.* Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

19. Briggs v. Elliott, 103 F.Supp. 920 (E.D.S.C. 1952), *rev'd sub nom.* Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

20. Gebhart v. Belton, 33 Del. Ch. 144, 91 A.2d 137 (Sup. Ct. 1952), *aff'd sub nom.* Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

21. Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

Fund and their temporal location on the Supreme Court calendar. As it happens, two are located in educationally, culturally, and economically deprived rural counties in the deep South. The choice of one of those districts for study might be explained in terms of method, but not both. Two are in border states — one in a small city, the other in a sprawling county that includes an urban area. Again, there seems to be no reason to look at both in detail. The fifth is in the nation's capital, a largely black city to start with, where the choice of a metropolitan-wide school system was unavailable. It is unique and hence useless for comparative purposes.

Professor Wolters to some extent disclaims any intent to generalize from the events in the five systems,[22] but that is precisely what he does both at the book's beginning[23] and at its end:

> Prudent social policy and a consistent application of the Constitution require that *Green* [*New Kent County*] be repudiated and that Judge Parker's dictum in *Briggs* be revived as the correct interpretation of the equal protection clause. The ambiguous *Brown* opinion would then be understood to mean what most people thought it meant in 1954, and desegregation would mean what Congress certainly intended when it enacted the Civil Rights Act of 1964: the prohibition of official racial discrimination, not the prohibition of racially neutral policies that do not lead to a substantial amount of racial mixing. Management of the public schools would then be returned to local school boards and superintendents, and racial policies would be fashioned through the give-and-take of the democratic process. With every form of racial discrimination prohibited, local officials would almost certainly improve on the sorry record that disingenuous judges and naive educational reformers have made in the *Brown* school districts.[24]

Putting aside the question of Wolters's qualifications for assessing the good faith of federal judges and the appropriate management of local school systems, I see little in even his own account of these school districts to compel this morose conclusion.

To begin with, Wolters fails to articulate the premises underlying his wholesale condemnation of the experience in the *Brown* districts; he never describes what he thinks are the fundamental social values at stake in the desegregation context. Accordingly, Wolters never evaluates the possible consequences of a reversal of *New Kent County*, possibly because his treatment of the case itself is so unsophistica-

22. WOLTERS at 273 ("My primary goal has been to write an interesting account of desegregation in these districts, not to prove a point or offer solutions to legal and educational problems").

23. *See supra* text accompanying note 15.

24. WOLTERS at 288-89.

ted. To conclude, as Wolters does, merely that the Court in *New Kent County* "prohibit[ed]. . .racially neutral policies that do not lead to a substantial amount of racial mixing" is to forsake analysis for glib oversimplification. Whatever the constitutional import of *New Kent County* — and its meaning is a subject of debate — it seems clear that any discussion of the case must at the very least recognize that, *under the circumstances*, freedom-of-choice plans were an ineffective means for achieving the constitutionally required end: " 'the abolition of the system of segregation and its effects.' "[25] To return in 1984 to the rhetoric of "freedom of choice" without an exploration of what that principle meant in New Kent County in 1968, as Wolters does, is inadequate both as history and as legal commentary.[26]

This is not the place to debate at length the legal and social questions surrounding *Brown* and its progeny. However, even if one accepts Wolters's underlying framework, there remain serious flaws in his discussion of the specific events in each of the districts. Within the case studies themselves, Wolters focuses solely on evidence that supports his conclusions, while he ignores available facts that would at least qualify them. Because the book is limited to the *Brown* districts, Wolters also fails to reconcile the problems he sees there with apparent successes in similar districts elsewhere in the country.

Wolters begins his narrative with the District of Columbia, in a chapter sardonically entitled "Showcase of Integration."[27] The entire chapter assumes that both the decrease in the percentage of whites in the District schools ("white flight") and the increase in the absolute number of blacks were caused largely by desegregation.[28] Additional blame for the District's problems is laid to the abolition in *Hobson* v. *Hansen*[29] of the tracking system instituted by Superin-

25. *New Kent County*, 391 U.S. at 440 (quoting Bowman v. County School Bd. of Charles City County, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring) (citation omitted)).

26. One might in fact place *New Kent County* on a different axis than Wolters does — an axis that differentiates "individual harm" and "group discrimination" as legally cognizable harms, rather than one that spans the spectrum of legally appropriate remedies. *See infra* text accompanying note 63.

27. WOLTERS at 9-63.

28. Why did so many white students depart from the public schools while blacks moved into the District?. . .[I]t would be wrong to conclude that desegregation was not a major factor in the shift. . . . [G]iven the prevailing suspicion of those considered different, substantial flight probably would have occurred even if suburban public schools had not been readily available.

Id. at 16-17 (footnote omitted).

29. Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), *remanded without modification sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

tendent Carl Hansen, a system of which Wolters evidently approves.[30] Judge Skelly Wright, the author of that opinion, is portrayed as the villain of the chapter, even though white flight, whatever its cause, was already well underway before the decision. The chapter in summary blames the District's educational problems on "sentimental pedagogy and judicial arrogance."[31] Whatever the merits of the tracking system and of Judge Wright's judicial response to it, that conclusion seems simplistic and opinionated.

Prince Edward County was a symbol of massive resistance to any degree of school desegregation. It had no educational system at all for black children from 1959 until 1963, when the Free School Association was opened on the initiative of the Kennedy administration. In the meantime, white children attended "private" white academies subsidized with tuition grants from the state. On the whole, this appalling story is treated by Wolters with understanding and even sympathy for the whites threatened by *Brown*: "In the final analysis, massive resistance collapsed because whites broke ranks"[32] is his bland assessment. The extraordinary genetic and racial theories of Henry E. Garrett, a former president of the American Psychological Association who was a witness for the school board in the litigation, are treated at some length, completely uncritically.[33]

Wolters does record that the public schools reopened after the Supreme Court's decision in *Griffin v. School Board of Prince Edward County*,[34] with seven white students in 1964 (as compared with 1400 blacks), increasing to about 100 in 1972,[35] but he fails to give recent and easily obtainable racial statistics for the county's public schools. Had he inquired, he would have found evidence of substantial integration in subsequent years; there were 746 whites along with 1628 blacks in the system in 1984-1985.[36] Test performances steadily im-

30. *See, e.g.*, WOLTERS at 17-23. *See also supra* text accompanying note 15; WOLTERS at 281 ("By the 1980s there was a growing recognition that the public schools had suffered from many of the changes associated with desegregation. Instead of solving complex problems that went beyond the schools, it seemed, the reformers had undermined the quality of academic instruction").

31. *Id.* at 63.

32. *Id.* at 93.

33. *See, e.g.*, *id.* at 76 ("A man of impressive, patrician bearing. . .[a] prominent psychologist"); *id.* at 84-85 ("An authority on intelligence testing and racial differences,. . .Garrett was of the. . .opinion that blacks were genetically inferior to whites in reasoning power and. . .imagination"; he "believed many American liberals. . .had rejected a sane approach to inherent racial characteristics. . . ."); *id.* at 146-47.

34. 377 U.S. 218 (1964).

35. WOLTERS at 116-17. Wolters does note that "[a]t the end of the [1970s] approximately 23 percent of the 2,200 public school students were white." *Id.* at 121.

36. These data are available from the Office of the Superintendent, Prince Edward

proved through 1980.[37] It would be possible to conclude the story on a note of optimism; faced with the expected problems in the rural South after *Brown*, judicial intervention eventually brought about a constitutionally organized school system in the county with significant white participation and statistically improved educational performance. Wolters, however, thinks differently. His conclusion, written with satisfaction if not outright approbation, is that "as this is written, the county's determined white people have largely nullified three decades of judicial effort to reconstruct their schools."[38] Wholly apart from questions of methodology or historical omission, it is hard to see how this conclusion in any way supports Wolters's thesis with respect to the improprieties of judicial activism.

In the case of Clarendon County, there is at least a relationship between Wolters's thesis and the history of the school litigation. The county's population has been mostly black — 72 percent in 1954 declining to 62 percent twenty years later.[39] The student statistics in the Summerton public schools reflect the cultural and social consequences of that reality; there have been virtually no white students enrolled since application in 1970 to the Summerton school district of the Supreme Court's decision in *New Kent County*.[40] Previously, under a freedom-of-choice plan, there had been 28 blacks attending previously white schools, and no whites attending previously black schools — a situation presumably satisfactory to Wolters, in view of his caustic assertion that Judge Wisdom's early rejection of freedom-of-choice plans in the *Jefferson County* case was "legally plausible" because "the Constitution has come to mean whatever the judges say it means."[41] It may make sense to say that there was a causal relation between the end of freedom-of-choice plans as a constitutional option and the complete resegregation, through white flight, of the Summerton public schools, although

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County Public Schools Division. I am indebted to Professor William Eskridge of the University of Virginia Law School for making available to me a letter to him from Jeannette Simmons of that Office, dated July 30, 1985, giving these figures.

37. WOLTERS at 120-21.

38. *Id.* at 127.

39. *Id.* at 130.

40. *Id.* at 165. The case was Brunson v. Bd. of Trustees of School Dist. No. 1 of Clarendon County, South Carolina, 429 F.2d 820 (4th Cir. 1970).

41. WOLTERS at 154-55. The case in which Judge Wisdom's opinion appears is United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967) (en banc). Wolters goes on to say that Judge Wisdom's "additional effort to reconcile the mandatory integration of the 1966 guidelines [on administration of the Civil Rights Act, issued by HEW's Office of Education] with the Civil Rights Act was pure sophistry" and describes Judge Wisdom's opinion as "crafty but specious." WOLTERS at 155.

Wolters reaches that conclusion without any discussion of the opposite result in many parts of the rural deep South, in Prince Edward County, and even in other parts of Clarendon County. But acceptance of that interpretation of the history of one school district in one county in South Carolina does not seem to me to warrant or even explain conclusions which I believe to have controlled Wolters's thinking before the book was started.

The quality of Wolters's evaluation of the stories of the five *Brown* districts does not improve with the sections dealing with New Castle County, Delaware or Topeka, Kansas. The former case evolved in the 1970s into a judicial effort to deal with the fact that the schools in Wilmington were 90 percent nonwhite, while those in the rest of the county were 90 percent white.[42] It is this effort that is the object of Wolters's scorn — the premise again being that "law [was] manipulated. . .disingenuously to achieve a result the judges considered socially and economically desirable."[43] Wolters's discussion of the failure of the effort, as he sees it, is to me no more persuasive than the chapters on the District of Columbia, Prince Edward County, and Clarendon County, and it seems distorted by his reaction to incidents of misbehavior by black students.[44] Much less space is given to Topeka, perhaps because there "at least, desegregation was not an obvious failure"[45] and perhaps because new litigation is pending.[46] As in the remainder of the book, the style of writing in these sections is graceful, and much of the local historical detail is interesting. It is the continuous interjection of conclusory vituperation against the courts and their intrusion on white priorities, unsupported by any attempt at serious evaluation of the reasons for the judicial behavior in such cases as *New Kent County*, that grates.

Beyond question, there is plenty of room for differing evaluations of the *Brown* experience to date. School statistics between 1968 (a more representative date than 1954, because it marks the beginning of intensive attention on the part of the Supreme Court to the question of remedy) and 1980 show a nationwide decrease in the percentage of black students in schools with more than 50 percent minority students (from 76.6 percent to 62.9 percent) and in schools with more than 90 percent minority students (from 64.3 percent to

42. WOLTERS at 175.
43. *Id.* at 228.
44. *Id.* at 241-46.
45. *Id.* at 253.
46. *Id.* at 270-71.

33.2 percent).[47] These figures suggest substantial national desegregation. But almost all of this change occurred within the first five years after the *New Kent County* decision, and by far the greatest proportion occurred in the South and the Border States.[48] Racial segregation by this measure has increased in the Northeast during the same period,[49] although the causal connection between this fact and the traces of *Brown* is unclear. The *Brown* remedies have clearly had an effect, but what has it been? Have the courts since 1972 been engaged in an unproductive, even counter-productive, effort that is at bottom judicially unmanageable, a sentiment that one may discern in the Supreme Court's hesitancy about intrusive remedies since its 1974 decision in *Milliken I*?[50] Consider, for example, the statistics and events in such settings as Atlanta, Boston, and Detroit. And has there been a serious educational and social cost, as Wolters attempts to demonstrate? Finally, is there a lesson to be learned from the experience in the *Brown* experiment during the past dozen years, something that serves a prescriptive function for policy-makers, especially those in the black robes? If so, what is it?

These are hard, perhaps unanswerable questions, but they do not daunt Jennifer Hochschild. She believes in desegregation[51] not only as a goal of public education, but as the kind of defining goal around which other policies should be clustered.

> *When fully and carefully carried out*, mandatory desegregation reduces racial isolation, enhances minority achievement, improves race relations, promotes educational quality, opens new opportunities, and maintains citizen support. *When fully and carefully carried out*, mandatory desegregation does not harm (and may improve) white achievement. It need not increase (and may decrease) violence and vandalism in the schools. It promotes reforms in educational structure and processes, and it may expand educational options. It can bring an influx of federal, state, or local money and talent into the schools. It seldom significantly increases (and may decrease) the cost or distance of bus rides. When properly implemented, busing itself causes no educational, physical, or psychological damage. Desegregation can teach students to respect, understand, and even like people different from themselves, and it prepares them for life in an increasingly multiracial na-

47. HOCHSCHILD at 30.
48. *Id.*
49. *Id.*
50. Milliken v. Bradley, 418 U.S. 717 (1974) (multidistrict remedies for single-district school segregation violations are inappropriate where there is no showing that the other districts have failed to operate unitary school systems).
51. The word "desegregation" is used with quite different meanings in the two books. Hochschild has an activist conception of the term, whereas Wolters uses it more conventionally to mean a *restraint* on state action.

> tion. It can give parents more knowledge of and influence over their children's schools. Even the new harms to minorities — faculty displacement, resegregation through tracking, excessive punishment, denigration — do not occur *when the school district fully and carefully desegregates*.[52]

If one believes that these benefits flow from racial desegregation, as Hochschild clearly does — passionately, both as an act of intellect and as an article of faith — and if one also understands and follows the implications of that belief, as Hochschild does — explicitly, powerfully and relentlessly, almost remorselessly — then the key to everything is in the italicized phrases. Such failures as have occurred in the *Brown* experiment are not from trying to do too much, from overstepping the boundaries of appropriate judicial injunction, as Wolters (as well as current federal policy-makers) would have us believe, but rather from doing too little. Hochschild's targets are, accordingly, incrementalism and popular control, which favors incrementalism. Authoritarianism, exercised by judges where appropriate, and desegregation "full speed ahead"[53] are her prescriptions. The stunning boldness of this thesis is supported by evidence of wide scholarship, careful structural analysis and synthesis, explicit political theory, and, above all, an extraordinary and searching intellect.

The title of her book, *The New American Dilemma*, is, of course, an echo of Gunnar Myrdal,[54] whose figure intimidates Hochschild no more than does the prospect of the inroads her prescriptions may make on theories of liberal democracy and popular control. Myrdal is portrayed as both the source and a victim of what Hochschild calls the anomaly theory, which asserts that racism is "a terrible and inexplicable anomaly stuck in the middle of our liberal democratic ethos."[55] But if racism is truly an anomaly, Americans must want to abolish it, and its abolition should therefore be possible through conventional forms of political action. Hochschild finds this theory inconsistent with American political history, including that since *Brown*, and accordingly she favors a symbiosis theory: "[R]acism is not simply an excrescence on a fundamentally healthy liberal democratic body but is part of what shapes and energizes the body," so that "liberal democracy and racism in the United States are histori-

52. HOCHSCHILD at 177-78 (emphasis in the original).

53. *Id.* at 177.

54. G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

55. HOCHSCHILD at 3.

cally, even inherently, reinforcing."[56] From this political economic theory — Marxist at least in spirit, as she notes explicitly[57] — flows her conviction that racism (of which segregation in the public schools is simply one consequence, examined as a test case) must be rooted out forcefully.[58] Her book is intended to show that, contrary to the teachings of the incrementalists, such a forceful rooting out can and will work.

It is in this effort, in my judgment, that the book fails. The specific Hochschild formula for policy-makers is familiar: massive busing, metropolitan-wide remedies, the elimination of racism inside schools (through the control of both student and teacher behavior), and strong leadership for desegregation.[59] But there is no reason to believe that the institutional limitations on judicial control of society will permit the courts to do what Hochschild thinks necessary to implement even those elements of this formula that are within reach of structural injunctions. Indeed, the evidence is mostly to the contrary. Further, artificial achievement of racial integration in some classrooms seems a pale sort of policy prescription to overcome the indigenous problems suggested by Hochschild's theoretical framework. It is unclear, for example, precisely what she would have the courts do about the black mass populations in the cities. She is an incrementalist in her own way. Because she treats education as a case study of symbiotic racism, she does not attempt to deal with the interrelationships, the indivisibility, of the cycles of the effects of race on jobs, housing, poverty, family structure, and the like, even though the provocative tenor of her analysis leads the reader to expect policy recommendations going to the core of American racial problems, not just to the details of bringing about racial integration in schools.

Hochschild does, I think, recognize the problem. She is scrupulous in examining the evidence on such matters as busing, metropolitan remedies, and gradual integration.[60] She cites a number of educational studies, for example, in support of her final assertion that "[e]xtensive busing, if well done and combined with other changes, *does* enhance educational quality, school system stability, race relations, and feelings of equity"[61] — certainly a proposition

56. *Id.* at 5.
57. *Id.* at 6-8.
58. *Id.* at 10-11, 203-04.
59. *See, e.g., id.* at 190-98.
60. *Id.* at 46-91.
61. *Id.* at 61 (emphasis in the original).

that contradicts the conventional wisdom. She also explores, and rejects, the possibility that voluntary local initiatives will eventually achieve satisfactory racial integration.[62] But there is something arid and unpersuasive about these efforts. They are logical and scholarly, but so inconsistent in result with actual experience that it is hard to believe that any real person — even any real judge — is going to read the book and then actually do anything. The problem is not simply a failure of judicial will; there are serious questions, not discussed in the book, about judicial capacity.

In a way Wolters's book is a useful complement to the relentless force and comprehensive scholarship shown by Hochschild. The two books should be read together. For the elegant intellectual structure forming the base of the Hochschild policy prescriptions may be strong enough only to flourish in the protected sanctuary of the academy (as in Princeton, where Professor Hochschild teaches), while the invulnerable preconceptions — prejudices, really — of the Wolters vision of the *Brown* experiment control the future out there.

This is a conclusion I reach with regret. It reflects my own judgment of who is winning an underlying debate in the United States about the course of racial justice now and in the future. The debate, of course, is not put in such combative terms. It is put in terms of "the nondiscrimination principle."[63] According to this principle, whites no more than blacks should be disadvantaged because of their race. As applied to schools, this means no busing, because white children are perceived by their parents as being disadvantaged on account of their race when they are transported to a school they did not choose because there would not otherwise be enough white children in that school. As applied to jobs, it means no effective affirmative action, since any effective affirmative action deprives some whites, because they are white, of specific placement opportunities otherwise available. There is, after all, a perception of unfairness when equally qualified whites are passed over for blacks in hiring, in admission to a university, in promotion, in any benefit whose distribution has historically been controlled by conceptions of merit rather than by the reality of need.

Leaving aside the ambiguities of determining degrees of "qualification," the perception exists because it is accurate. Many of the statistical gains for blacks during the past twenty years in such mat-

62. *Id.* at 92-145.

63. *See, e.g.*, Reynolds, *Individualism v. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995 (1984).

ters as employment and education have been achieved despite this fact. Nevertheless, it is now recognized that there is a cost to whites from racial justice for blacks, because some whites have to move aside to make room, at least for an indefinite period of transition, for blacks. The force of this reality is increased by the inability of intellectuals to respond to the analogies that are inescapably invoked against any departures from strict application of the nondiscrimination principle that permit fuller participation by blacks in the economic, political, social and educational life of American society — analogies to other groups in this "nation of minorities," for example, and to models of law, including theories of the equal protection clause, that deal primarily with individual wrongs and identifiable victims and beneficiaries, rather than with groups.

Professor Hochschild faces up to the terms of this debate,[64] yet she plows ahead with her rather doctrinaire prescription. Professor Wolters, while apparently committed to the proposition that race-conscious action which disadvantages whites cannot be justified, never indicates an awareness of the deeper questions underlying the desegregation problem. It is this fight for the American soul that I think Raymond Wolters and those who share his views are in fact winning, although, based on the comparative merits of scholarship and intellectual force, measured against those of Jennifer Hochschild, he should have been disqualified at the outset.

64. *See, e.g.*, HOCHSCHILD at 202 (discussing with approval the analyses by Alan Freeman, which argue that the "individual harm" perspective is irrelevant at best when complete societal desegregation is the goal).